IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 577 OF 2004

1. Lawrence John Lobo)
2. Andrew Lawrence Lobo)
3. Francis Lawrence Lobo) .... Appellants

versus

The State of Maharashtra ... Respondent.

None appears for the appellants
Mr. V.B.K.Deshmukh APP for Respondent.

CORAM; V.G. PALSHIKAR &
SMT.NISHITA MHATRE,JJ.

DATED; 18TH NOVEMBER, 2006.

JUDGMENT: (Per Palshikar, J.)

1. Being aggrieved by the judgment and order dated 22nd March 2004 passed by the Addl. Sessions Judge, Gr. Bombay in Sessions trial No. 877 of 1992, the appellants named above have preferred this appeal on the grounds mentioned in the memo of appeal as also verbally canvassed before us.

2. When the matter was called out the advocate appearing for the appellants was absent. We have noticed for the last three months in most of the cases where the parties are represented by lawyers engaged by them, remain absent and in number of cases we have

observed this by taking up the hearing in the absence of the advocate, as it is necessary to avoid unnecessary languishing the accused persons in jail who may, after hearing and decision of the appeal, be found not guilty. With the assistance of the learned advocate appearing on behalf of the appellant and the learned APP, we have scrutinised the entire record and reappreciated the evidence both oral and documentary on record.

3. The prosecution case briefly stated is that one Smt. Fatmabi and her three sons Salim, Chandmohammed, and Ismail resided together in Chawl No.102, Pipe Line, Kherwadi, Bandra (East), Mumbai 400 050. One daguther -in-law of Fatmabi also resided with them. The accused persons from Lobo family resided just in the same vicinity at the rear side of the road. About two months prior to the incident there was a quarrel between Chandmohammed, the son of the complainant and accused Andrew Lawrence Lobo and Freddie Lawrence Lobo.

4. On 23-5-1992 at about 11.00 p.m. her son Chandmohammed had gone to the house of one Chhotelal Bhaiya for electric work. They were talking with each other. Lawrence Lobo and his sons were asking not to come to their side and started quarreling with Chandmohammed. Complainant Fatmabi went there and

asked Lobo why they always used to quarrel with her son. Lawrence John Lobo gave one slab blow on the mouth of Smt. Fatmabi. When she shouted alound, her son Salim came running at the spot whereupon Andrew Lawrence, Freddie Lawrence and Francis Lawrence assaulted Salim with hockey stick, iron pipe and stump on his head. The complainant, mother of Salim shouted aloud for help. The people assembled there. One Jaisingh Thakur came and separated Salim from Lobo family. Salim had fallen down unconscious. With the help of neighbours Salim was taken to the Bhabha hospital by the complainant and she went to the Nirmal Nagar police station and informed the incident. Then she went back to Bhabha hospital. Her son Salim was still unconscious. Since Salim was critical in his health, he was transferred to KEM hospital. He had sustained bleeding injuries on his head and forehead. He was not in a position to speak. While in KEM hospital, the Nirmal Nagar Police officers came there and recorded the complaint of Smt. Fatmabi at about 4.30 a.m. on 24-5-1992. On the basis of her complaint CR No. 133 of 1992 was registered in Nirmal Nagar Police station and police then carried out the usual investigation.

5. During the trial the prosecution examined 8 witnesses to prove its case and the learned trial Judge

on appreciation of this evidence on record, came to the conclusion that the accused persons are guilty of the offence of murder. It is necessary to note at this stage, that during the pendency of the trial, accused no.4 died and the whole case abated as against him. The learned trial Judge therefore convicted the remaining three accused as aforesaid. It is this order, which is challenged in this appeal.

6. Of the 8 witnesses examined by the prosecution, P.w.1 Fatimabi, P.w.2 Chand Mohd. are the persons directly connected with the incident and are eye witnesses. They give a clear account of how the assault took place. Fatimabi states that accused no.1 slapped her and the accused nos.2 and 3 assaulted Salim the deceased with the hockey stick and cricket stump. Accused no.2, since deceased, assaulted the victim with iron rod. On all the material point the testimony of Fatimabi is duly corroborated by the testimony of P.w.2 Chand. Independent corroboration to this evidence is also available from P.w.6 Jaisingh, who arrived at the scene of offence immediately after the quarrel started. He saw Salim falling to the ground. He saw the scuffle taking place and he saw the accused persons running away from the spot. He later on came to know that Salim succumbed to the injuries caused to him by the accused persons. He identifies the accused persons

from Lobo family as the accused present in the court. Thus there is independent corroboration to the eye witness's testimony of P.ws. 1 and 2. There is also medical corroboration to this evidence as will be seen from the evidence of Dr. Manisha who conducted the post mortem and proved that the death was homicidal in nature. P.w.3 Dalchand took Salim to the hospital. P.w.5 Dr. Maheshkumar is the doctor who examined P.w.1 injured Fatimabi. P.w.7 Dr. Abhay is the doctor who examined Salim on admission and P.w.8 Shivaji is the investigating officer.

7. We have already noted above that the eye witness account is duly corroborated by the testimony of independent witness Jaisingh and the testimony of doctor who has deposed about the injuries caused to the victim Salim. It is obvious that the injury caused by the accused no.4 Freddie was the vital injury and comparatively less likely to cause death though the assault itself by cricket stump and hockey stick is likely to cause death if met on vital parts. In this case the assault was on the head of the victim. There is proved enmity between the parties. However, even if the entire evidence is accepted there is nothing in it to warrant a conviction under section 302 IPC as there is no proof of any intention to commit murder. The enmity was existing between the parties that the Lobo

family wanted that no work should be executed in the house of their immediate neighbour by Chand and it was because of that the enmity existed. It was when Chand came to work with the accused, started abusing him and then assaulted him. The whole idea in so doing was to do something deterrent which would result restraining Chand or desisting him from accepting any work in the neighbourhood of Lobo family. Intention to kill was not there is also evident from the fact that the stump and hockey stick are used. Iron rod was used by accused no.4 who is now dead. The accused no.1 has slapped Fatimabi and therefore the trial Judge rightly convicted him under section 323 of IPC. In our opinion the interest of justice would be met if the accused nos.2 and 3 are convicted under section 304 (II) IPC. In our opinion the accused did have the knowledge of the fact that such assault on the person of victim by hockey stick or stump is likely to cause death. Use of iron rod by Freddie accused no.4 was something which may not persist and could not have been followed by the other accused persons. The common intention which they had factually shared was to do something deterrent to prevent Chand to do the work and therefore used hockey stick and stump. User of these weapons definitely had the knowledge that its use is likely to result in death. Accused persons intended to cause harm to the victim and they did not intend to kill him. In our

opinion conviction under section 302 IPC is in the circumstances, unsustainable.

8. In the result, the appeal partly succeeds and is partly allowed. The conviction and sentence under section 302 IPC is set aside. Instead accused nos.2 and 3 are convicted under section 304 (II) read with 34 of IPC and they are sentenced to suffer R.I. for a period of 10 years. The appeal accordingly is disposed of.

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